FILED
OCT 27 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 311.

CHARLES D. OFFHOUSE, *et al.*,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON IN THE COUNTY OF PASSAIC, a corporation,
Appellee.

PETITION FOR REHEARING.

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The appellants present this petition for a rehearing of this cause, and in support thereof, respectfully show:

I.

Phelps v. *Board of Education*, 300 U. S. 319, Is Not a Controlling Precedent.

The *per curiam* judgment of this Court, on October 9, 1944, dismissed this appeal for want of a substantial federal question, on the authority of *Phelps* v. *Board of Education*, 300 U. S. 319, at page 323.

That case determined that the Teachers' Tenure Act enacted in 1909 (Ch. 243, P. L. 1909; now R. S. 18:13-17) did not create a contract.

The claim of contract in this case is based upon a 1903 statute (Ch. 1, P. L. 1903, Second Special Session, § 106;

now R. S. 18:13-5 and R. S. 18:13-7). That statute, which is determinative of the issue here, was not in issue in the *Phelps* case.

The 1909 act, which was determinative of the *Phelps* case, is not the basis for the claim of contract in issue here.

The two statutes, the 1909 act and the 1903 act, exist independently of each other; they are distinct and separate statutes.

The 1903 act has never been construed by this Court.

In the *Phelps* case, no claim of constitutional right was made upon the basis of any statute other than the 1909 act, or upon any express contract entered into between the teachers and the school board. The appellants in that case contended (300 U. S. 319, at 322) that they had, by virtue of the 1909 act, a "contractual status indefinite in duration which the legislature is powerless to alter or to authorize the board of education to alter". No express contract between the parties was in evidence or in issue. The contrary was stipulated (300 U. S. 319, at 323).

In the case at bar, the claim is made (1) that the appellee was authorized by the legislature to contract with the appellants pursuant to the 1903 act; (2) that the appellee did so contract and performed its contract (as did the appellants) for more than 11 years; (3) that the appellee repealed that contract, in violation of Article 1, §10 of the Constitution. The appellants here do not claim a "contractual status indefinite in duration" by virtue of the 1909 act.

The appellants respectfully insist that their claim presents a question entirely different from that treated in the

Phelps case, and upon which they are entitled to invoke the judgment of this Court. An adjudication of rights under statute "A" (the 1909 act in the *Phelps* case) cannot determine rights under statute "B" (the 1903 act in this case). The appellants respectfully submit that the essential, vital differences between their claim and that treated in the *Phelps* case were overlooked by this Court, an oversight which is demonstrated by this Court's reference, in its *per curiam* judgment, to page 323 of the opinion in the *Phelps* case.

Two points are disclosed on that page of the opinion: (1) that there was no contract arising out of any act of the parties in that case; and (2) that the 1909 statute created no contract.

In the instant case, (1) there is a complete and express contract between the parties; (2) the appellants do not contend that the 1909 act created any contract; (3) the record not only discloses a continuing contract between the board and the teachers, but (4) it shows that the board hired and paid its teachers on the basis of that contract.

In 1941, more than four years after this Court affirmed the New Jersey Court of Errors and Appeals in its view that the appellants in the *Phelps* case had no "contractual status" under the 1909 act, that same court construed the 1903 act as authorizing a school board to make an effective contract with its teacher employees. See *Weber* v. *Board of Education of Trenton*, 127 N. J. L. 279, at 284, 285, 286. It was there held (at page 284) that "the power to make rules and regulations [under the 1903 act] with respect to teachers and their employment does not carry with it the right to abrogate definite salary contracts."

In this case, there is a definite salary contract, having the same form as the contract in the *Weber* case.

The decision of the New Jersey Court of Errors and Appeals in the *Weber* case was based directly upon the same statute here in issue, and followed by more than five years its decision in the *Phelps* case. It precludes any conclusion that a contract could not arise under the 1903 act by reason of anything this Court may have said in the *Phelps* case. The decision in the *Weber* case should receive the consideration of this Court.

The appellants believe that it is not this Court's intention to foreclose itself from a consideration of any constitutional question under any law of New Jersey which, on its surface, may appear to touch the particular statute or general subject matter reviewed in the *Phelps* case, and yet this is the implication of its decision dismissing this appeal on the authority of the *Phelps* case.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that the *per curiam* judgment of this Court, be, upon further consideration, vacated, so that this Court may hear this case upon its merits.

Respectfully submitted,

JEROME C. EISENBERG,
Counsel for Appellants.

Certificate of Counsel.

I, JEROME C. EISENBERG, counsel for the above named appellants, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JEROME C. EISENBERG,
Counsel for Appellants.